IN THE

Supreme Court of the United States

NO. 77-1548

KENNETH HAMMOND,

Petitioner,

VS.

STATE OF ALABAMA,

Respondent.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

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ATTORNEYS FOR RESPONDENT

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BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF AND ARGUMENT FOR RESPONDENT

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals is reported as *Hammond v. State,* in Ala. Cr. App., 354 So.2d 280 (1977). Petition for Writ of Certiorari, upon preliminary examination, was granted by the Alabama Supreme Court on June 22, 1977. After the submission of briefs and oral argument, the Alabama Supreme Court, without opinion, quashed the writ as *improvidently granted* on December 16,

1977. This judgment and order of the Alabama Supreme Court is reported as *In re Hammond v. State of Alabama* in Ala., 354 So. 2d 294 (1977).

JURISDICTION

The petitioner has applied to this Honorable Court for a Writ of Certiorari to review the judgment of the Alabama Court of Criminal Appeals rendered on March 1, 1977.

Petitioner applies for this Writ of Certiorari pursuant to 28 U.S.C., §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent submits there are no constitutional provisions involved because none of petitioner's constitutional rights were in any way denied, abridged, infringed or violated, either at the trial or appellate level in Alabama. Consequently, this Honorable Court would not have jurisdiction to review the judgment of the Alabama Court of Criminal Appeals nor would petitioner have any claim of entitlement to that review.

Be that as it may, petitioner alleges that the following constitutional and statutory provisions are involved:

The Fourteenth Amendment to the Constitution of the United States which provides in pertinent part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

28 U.S.C. §1257(3) which provides in pertinent part:

> State courts; appeal; certiorari. Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, . . . of . . . the United States.

Section 13-9-40, Code of Ala. 1975, which provides:

> *Definitions.*
>
> For purposes of this division, the following words and phrases shall have the respective meanings ascribed by this section:
>
> (1) INCITING TO A FELONY. The effort or endeavor by one person to induce, procure or cause another to commit a specific felony.
>
> (2) INCITING TO A MISDEMEANOR. The effort or endeavor of one person to procure or cause another to commit a specific misdemeanor.

Section 13-9-41, Code of Ala. 1975, which provides:

> *Inciting to felony.*
>
> Any person who incites to a felony shall be imprisoned in the penitentiary for not less than one nor more than 10 years; provided, that, if such person incites to a felony under circumstances and

with results which would render him an aider or abettor in the commission of such felony, he may be indicted, tried and punished as a principal in the commission of such felony or, at the election and choice of the state, he may be proceeded against as a violator of this statute; but in no event may a person be convicted and punished for the commission of the same criminal act or acts both as a violator of this statute and as a principal in the commission of the felony to which he shall have incited.

Section 13-9-42, Code of Ala. 1975, which provides:

Inciting to misdemeanor.

Any person who incites to misdemeanor must be fined not more than $500.00 and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months.

Section 13-9-43, Code of Ala. 1975, which provides:

Division cumulative; criminal solicitation.

This division is intended to be cumulative and supplementary to existing law or laws. It is not intended to supersede either the common law or any penal statute now in force. The common-law offense of criminal solicitation shall continue to be recognized in this state.

Section 13-5-30, Code of Ala. 1975, which provides:

Executive, legislative, judicial or municipal officers—Offering to such officers.

Any person who corruptly offers, promises or gives

to any executive, legislative or judicial officer or municipal officer or to any deputy clerk, agent or servant of such executive, legislative, judicial or municipal officer after his election, appointment, employment, either before or after he has been qualified, any gift, gratuity or thing of value, with intent to influence his act, vote, opinion, decision or judgment on any cause, matter or proceeding, which may be then pending or which may be by law brought before him in his official capacity, shall on conviction be imprisoned in the penitentiary for not less than two years nor more than 10 years.

Section 15-8-50, Code of Ala. 1975, which provides:

Allegation of different means or intents.

When an offense may be committed by different means or with different intents, such means or intents may be alleged in an indictment in the same count in the alternative.

QUESTIONS PRESENTED

1. Whether alternative allegations stated in a single count of an indictment denied petitioner his right to be informed of the nature of the charges against him, as is required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

2. Was petitioner's conviction of Inciting a Felony, to wit: Bribery, amply and sufficiently supported by competent evidence so as to preclude any violation of his rights guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and consequently preclude relief from this Honorable Court.

STATEMENT OF THE CASE

The petitioner was indicted by the Montgomery County Grand Jury in a three count indictment on August 8, 1975. Count One charged petitioner with Inciting to a Felony, to wit: Bribery; Count Two charged petitioner with Inciting to a Felony, to wit: Attempted Bribery; and Count Three charged petitioner with Acceptance of a Bribe (R. 1-4). At the close of petitioner's evidence, he moved to require the State to elect which count of the indictment upon which it relied. The State elected Count One and petitioner's case went to the jury on that Count. Consequently, only that Count and the overwhelming evidence supporting it are pertinent for purposes of this discussion. Count One is set out in pertinent part in petitioner's Petition (p. 3) and in the Alabama Court of Criminal Appeals' opinion at *Hammond v. State*, Ala. Cr. App., 354 So.2d 280, 287-288 (1977).

Petitioner attacked the sufficiency of Count One and the allegations contained therein by filing, prior to trial, a Plea in Abatement (R. 19-21); Motion to Quash the Indictment (R. 23-31) and a Demurrer (R. 37-39). In these motions Petitioner attempted to show that Count One and its allegations failed to adequately apprise him of the nature of the offense charged and that the same failed to sufficiently charge an offense. After lengthy pretrial hearings on these motions, (R. 81-A—314-A), they were all overruled and denied by the Montgomery County Circuit Court Judge. (R. 314-A—316-A). On direct appeal to the Alabama Court of Criminal Appeals petitioner raised as error the trial court's denial of these motions. The Alabama Court of Appeals, after oral argument and the submission of briefs, disagreed as they affirmed petitioner's conviction. *Hammond v. State*, Ala. Cr. App., 354 So.2d 280 (1977). Likewise, the

denial of these motions was raised as error on certiorari to the Alabama Supreme Court. They were as unimpressed as the Court of Appeals in that, after hearing oral argument and the submission of briefs, the writ was quashed by the Court as improvidently granted. *In re Hammond v. State of Alabama*, Ala. 354 So.2d 294 (1977). Petitioner, for a fourth time, again tries to convince a Court that it was error for these motions, as they relate to Count One and its sufficiency, to be denied.

As this Honorable Court well knows, crimes involving the betrayal of the public trust and base deceit often involve more elaborate schemes and connivance on the part of the accused than other crimes. Bribery itself, by its very nature, lends itself to conduct which is by necessity more vulgar, perverse and convoluted. Petitioner, because he lowered himself to devise, plan and carry out his most nefarious plan, should not now be able to benefit by accusing the prosecution of presenting "widely disparate and complex factual transactions." (Petition for Writ of Certiorari, p. 4). The State must take such despicable criminal conduct as it finds it. Petitioner made his bed, he should now be forced to lie in it.

Be that as it may, petitioner's scheme was not as disparate and complex as his counsel would now portray. As the evidence to be momentarily elicited below demonstrates, petitioner first "arranged" to be paid money for his efforts in placing vending machines for Tops Vending Machine Company in buildings owned or controlled by a utility, South Central Bell Telephone, which was governed by a governmental commission, the Alabama Public Service Commission, of which he was the elected head, ie. its President.

Petitioner accomplished this by utilizing his influence

over Charles Price, a telephone company assistant superintendent charged with keeping the Public Service Commission content and making sure telephone company rate increases were given favorable treatment. After the representatives of Tops Vending refused to pay for petitioner's "services", he exerted tremendous and constant pressure on Price to threaten the representatives of Tops, Rex or John Moore, to get their "business" straight with petitioner or face the removal of their machines. Petitioner forced Price to be a part of his base scheme by threatening him with an unfavorable and adverse disposition of a *telephone rate increase then pending before petitioner's Commission.* Petitioner did not begin pressuring Price to see the Moores until after the telephone company's rate increase was filed and pending before the Public Service Commission. Here is what the evidence reveals.

Testimony of John Moore

John Moore, a stockholder and the then President of Tops Vending Company (Tops), and his father, Rex Moore, also a stockholder in Tops, (R. 162-163), in late 1973, went to Petitioner for his help in securing the vending machine location and business for a certain South Central Bell Telephone plant in Montgomery, Alabama. (R. 166). Petitioner insisted on 10% of an estimated $100,000 a year volume for his help in placing Tops' machines in telephone company buildings. The Moores refused this "deal". (R. 167) In January of 1975, after having been previously contacted by the telephone company, the Moores were again contacted by a telephone company official who informed them the company had decided to give Tops the contract on the Adams Street (in Montgomery, Alabama) plant. Pursuant to this agreement, the machines were installed. (R. 171).

In April of 1975 John Moore, at the request of his

father, gave petitioner $100.00.

Testimony of Rex Moore

Rex Moore corroborated his son's testimony concerning the 1973 meeting wherein petitioner demanded $10,000 for his efforts in helping Tops place vending machines in telephone company buildings. (R. 305).

In November of 1974, before the machines were actually placed, an official of South Central Bell contacted the Moores and offered them one-half of the vending machine business in a telephone company building. (R. 306) After viewing the location in which the machines were to be placed, Rex Moore met with petitioner. Petitioner demanded $5,000 for his help in securing the placement of one-half of Tops' machines. Moore refused. (R. 308). Later that day, Moore was called by the same telephone company official who told him the deal was off, telling him he was sorry that he could not see fit to handle fifty percent of the machines as it would have been a profitable adventure. (R. 308). Then, as stated, Tops was given 100% of the vending machine business for the telephone company plant in January of 1975. (R. 309).

After the machines were installed, (January, 1975) petitioner began contacting Rex Moore on a frequent and continual basis. (R. 310) Each time petitioner called or met Moore, he would demand money. Petitioner initially wanted his money in a lump sum. Now he asked for his money to be paid on a monthly basis, as a stipend out of the monthly vending machine intake. (R. 312). Rex Moore said the reason petitioner now wanted monthly payments was because he could not come up with the lump sum "front" money petitioner originally demanded. (R. 312). From January of 1975, Moore one time personally gave petitioner $100.00 and one time gave him $100.00 through his son. (R. 313).

Several months after the machines were installed, Charles Price, a telephone company assistant superintendent, came to see the Moores for the purpose of getting them to remove their machines from telephone company buildings. (R. 314)

In July, 1976, Rex Moore again met petitioner. At this meeting, petitioner talked about the Moores paying him a lump sum of $10,000 as petitioner had first proposed in 1975. (R. 319). He pushed Moore for a deal, inquiring what the gross of the machines would be because he wanted ten percent. (R. 354). Petitioner told Moore that he had lived up to his part of the deal and Moore needed to live up to his. (R. 354). After dissuading him of any possibility of paying him $10,000, petitioner again demanded a monthly stipend of $200-$300 a month. (R. 354-355). Petitioner had gotten the machines in, he now wanted his graft.

Left out of the Petition is the fact that this very damaging conversation between petitioner and Rex Moore was taped and then transcribed, both the tape and transcript being introduced and received into evidence.[1]

Testimony of Charles Price

Charles Price, an Assistant Superintendent with South Central Bell, had known petitioner for six to eight years. Petitioner approached Price and asked his help in placing

[1]Petitioner objected to the introduction of the tape and transcript at trial. On appeal, petitioner raised as error, citing both federal constitutional and state law grounds, the introduction of the tape and transcript. The Alabama Court of Appeals held that no error occurred in their introduction and receipt into evidence. **Hammond v. State**, Ala. Cr. App. 354 So. 2d 280, 292-294 (1977). These same grounds were again strenously raised on certiorari but that writ was quashed as improvidently granted. **In re Hammond v. State**, Ala. 354 So.2d 293 (1977).

some vending machines in telephone company buildings for some of his friends. Every time he saw Price, petitioner brought this subject up. (R. 386) Price called the district plant manager and asked him to talk with Tops about the possibility of placing half of Tops' machines in one of the telephone company's plants. (R. 386) The district manager called Tops and made the previously alluded to proposition concerning half the machine business for Tops. (R. 388). Price notified petitioner of this proposition, petitioner in turn calling Rex Moore to discuss the deal.[2] (R. 388). Price was aware that Tops' machines were eventually placed in the telephone company plant. (R. 388).

Several months after the machines were installed, approximately in April of 1975, petitioner told Price he wanted the machines removed. Price was puzzled in that for months petitioner asked him to get them placed but once installed, and only for a few months at that, petitioner began to pressure him to take the very same machines out. (R. 390). Price did nothing about this at first. However, petitioner began to exert considerable pressure on Price to remove the machines, that it became obvious to Price that petitioner was "pushing pretty hard", Price eventually realizing that he needed to do something about the matter. (R. 390).

Petitioner began exerting pressure on Price in April of 1975. In February of 1975, February 5, 1975 to be exact, South Central Bell had filed a rate increase with the Alabama Public Service Commission of which petitioner was President. (R. 391). *Consequently, there was a rate increase pending before the Alabama Public Service Commission when petitioner, President of the Alabama Public Service Commis-*

[2]This call came on the day Rex Moore went to inspect the plant, the call leading to the meeting between Moore and petitioner wherein the $5,000 up front money was discussed. (R. 307-308).

sion, began pressuring Price about the removal of the machines. (R. 391).

Specifically, petitioner told Price, "We've been talking about this for a long time. We are not going to get along, and I mean for you to get these machines out." (R. 392) Petitioner went on further to tell Price that, "We are not going to get along and you are not going to get what you need." (R. 353). This was obviously in reference to the rate increase then pending before the Public Service Commission filed by Price's employer.

Additionally, Price was told by petitioner that the telephone company would not get what it needed unless the Moores lived up to their agreement. (R. 398). Price knew his company had at stake a rate increase pending for fifty-nine million dollars and if the company had a commissioner mad at them they would not know whether they would get a fair hearing or not. (R. 397).

After these obvious threats were conveyed to him, Price went to see the Moores, this occurring around July 1, 1975. Price told the Moores that he did not know what the problem was between them and petitioner but petitioner was on his back to take the machines out. He told the Moores for them to get their problems settled with petitioner because he did not want to take the machines out. (R. 394).

Price met again with the Moores a few days later. He again told them he was sorry and that he did not want to take the machines out because he knew they had a big investment, *but that his company had a big investment and there was a lot at stake for his company* and the Moores. He told them they needed to get with petitioner and solve whatever problems they had. (R. 396-397). Importantly enough, hearings on the pending increase were to resume shortly after Price's meetings with the Moores. (R. 396).

After seeing the Moores, Price reported to petitioner that he had talked with the Moores and that they would be in touch with him. (R. 422). Petitioner did not respond by telling Price to have the machines removed, rather he expressed satisfaction that the Moores were going to get in touch with him. (R. 433).

Price did not doubt for a minute that petitioner meant the rate increase in his threats to him about him not getting or the telephone company not getting what it needed. (R. 402, 428). Price regarded petitioner's statements as threats, especially when he began to pressure him more and more (R. 405, 428). Price was concerned because the rate increase was pending and the telephone company could not afford a mad commissioner. He wanted to keep petitioner happy. (R. 410-411, 429).

Testimony of Petitioner

Petitioner admitted that as President of the Alabama Public Service Commission he had a lot of power over those whom the Commission regulated. (R. 591) Beside rate increases, petitioner acknowledged that there were numerous other areas and matters involving South Central Bell that required the Public Service Commission's approval. (R. 594) Petitioner admitted that the rate increase was pending when he talked to Price about the vending machines. (R. 594).

Petitioner admitted talking repeatedly with the Moores about placing vending machines in the Adams Avenue telephone plant. He even went to Moores' office on three occasions to discuss with them the possibility of helping them

get the vending machines installed. (R. 603-605). Petitioner was even given $100.00 by Rex Moore during January, 1975, the same month in which the machines were installed. Petitioner accepted this money.[3] (R. 607-610).

As mentioned, petitioner and Rex Moore's conversation on July 8, 1975 was taped. Petitioner admitted that the tape and transcript were correct. (R. 576, 627). He admitted recognizing his voice on the tape. (R. 627). During the trial, petitioner admitted making the following statements to Rex Moore, all of which are on the tape:

1. Petitioner admitted that he remembered Rex Moore saying to him, "Well, if you ain't threatened me, I don't know what the hell its been then." (R. 622-623, A10-A11).

2. Right after that remark petitioner admitted saying to Moore, "All I'm trying to do is business with you." (R. 623, A11).

3. Petitioner admitted that Rex Moore then said to him, "I've told you I'm in bad shape, I've told you that not one time, I've told you that a thousand times" to which Hammond admitted responding, "Physically or otherwise." (R. 624, A12). When Moore then responded with "Huh", petitioner admitted saying to him, "Physically or financially, or what." (R. 624, A12). Petitioner admitted Rex then said, "Financially, I've told you that." (R. 625, A12).

4. Petitioner admitted Moore then said, "Well, it's, it's

[3]Interesting enough, petitioner maintained that Moore had agreed to give him $200.00 per month for his help in getting the machines placed. In January of 1975, petitioner saw Rex Moore and asked him for some money. Moore said he would give him $200.00 and petitioner was expecting this amount. However, Moore only gave him $100.00 (R. 614-615).

everytime I turn around, now, its started on my boys now, and I've gone just as g.d. far as I'm going to go." (R. 625, A12). Petitioner admitted then saying, "I don't reckon I've said anything to your son. He came out here one day and he was supposed to have brought me two hundred dollars, and brought me a hundred dollars. That's the only thing—that's the last time I've seen him." (R. 625, A12, A13).

5. Petitioner admitted saying to Rex Moore that the envelope given to him by John Moore only had $100 in it and asked Rex Moore if he remembered giving him (Petitioner) a hundred dollars at the pool hall when he (Petitioner) was heading north. (R. 626, A13).

6. The following was read to petitioner from the tape as being said by him: "Let's go back and look at the situation . . . See what happened, you remember when you first called me in '73, me and you went out there . . . Your son went with you one time, you were talking about ten or twelve, if the volume was. . . ." Although read to him, petitioner stated he could not recall whether he said it or not. (R. 628-629, A14). Petitioner then admitted saying, "That deal never developed, do you follow me?" (R. 629, A15).

7. Petitioner admitted saying: "No, I just want to get the whole story out and let you see the general background. Then I talked to you in December before I went to San Diego on that trip and then there was a hold up." (R. 631, A15). Petitioner admitted Rex Moore then said, "I told you I didn't have no money." (R. 631, A15-A16). Petitioner admitted saying next that, "No, there was a hold up on them going in—remember." (R. 631, A16). Rex Moore then said, "You held them up." (R. 631, A16). However, after admitting the foregoing petitioner could not recall saying the following state-

ment read to him from the transcript of the taped conversation on July 8, 1975: (R. 632, A17)

"Rex Moore: You held them up.

Petitioner: Yeah, because we couldn't reach any agreement." (R. 631, A16).

8. Petitioner stated the following from the transcript could be correct:

"Rex Moore: That's right."

Petitioner: "Yeah, because we couldn't reach any agreement. I was wanting to reach an agreement before I went to San Diego and we didn't." (R. 633, A17).

9. Petitioner admitted saying to Moore:

"Okay. Then we come back from San Diego, prior to going out there, the question came up, half of it or all of it. We are discussing the better half and you were right, you said if you got that half, they would give you the other half, and you hit that button on the head, So, at that particular time, we were saying for that first half, two hundred dollars." (R. 634, A17).

10. Petitioner admitted the following:

"Rex Moore: I didn't hear anything from you at that time, me and you left down there, in that steak and egg place, and when I got home you called the man. He said, 'I'm sorry you didn't want the other

half.' And the next time I heard, from the phone company, not from you, from the phone company, and said, 'Put the machines in.' Now, whether you had that done or not, I don't know whether you had it done or not." (R. 635, A18,A19).

Petitioner: "You told me the second half would come in and it did. They told me that, they told me exactly when it happened. All of 'em is involved in the same company, and the same situation as you know. Now, we were talking about at that time for a half, we would gather in here, back and forth, every month." (R. 635, A19).

Petitioner then admitted he immediately said, "Then, we narrowed it down, agreed on the two hundred." (R. 636, A19-A20).

11. Petitioner continued by admitting he said the following:

"Well, I don't know whether I've squeezed you too damn much, if you don't make two hundred dollars, that's a hell of a squeeze." (R. 637, A20).

12. Petitioner stated he could not remember the following excerpt from the transcript of his conversation with Moore:

"Moore: Well, I mean, you know to come out and say you either going to take them out or do this, that and the other, I just want to know that one way or the other." (R. 637, A20).

Petitioner: "It's your business, if you want, the proposition is there, now, understand this." (R. 637, A20).

13. Petitioner stated he did not recall the following excerpt from his taped conversation with Moore:

"Moore: You want 'em out." (R. 639, A21).

Petitioner: "I moved them in, I feel like they've been in long enough for you to see the volume, and you know the kind of business you are doing." (R. 639, A21).

Finally, petitioner could not remember and did not know whether he made the following statements to Rex Moore, even though said statements were on the tape and were transcribed and were read to him at trial:

"Petitioner: If you are losing money, I'm sorry. (R. 642, A22).

Petitioner: But the only thing I can say, is this, that those blank are in. (R. 642, A22).

Petitioner: You've been in there long enough, and in fairness for you to see what the volume is. (R. 642, A22).

Petitioner: And to see what is—what is pretty well what's been done and what it hadn't done, and now, if its making a profit. (R. 642, A22).

Petitioner: I'll feel like if you want to be fair in it, and we could come up with some agreement on it. (R. 643, A22).

Petitioner: You know you say you got problems, well, I have, too, we all have. (R. 643, A23).

Petitioner: You got to keep this in mind, Rex, that

you wanted them in, we got them in, you wound up doing all the volume of business. (R. 643, A23).

Petitioner: You would come, you would—and then, and Moore—I sure would. (R. 643, A23).

Petitioner: And stuff, and January, around the 18th or 20th, February, March, April, May, June, they beer there a full five months plus. (R. 643, A23).

Petitioner: My automobile last year, you agreed to to tell me how the volume was doing. (R. 644, A23).

Petitioner: Our main problem, I don't know what your other machines are doing, I couldn't care less. (R. 644, A23).

Petitioner: But I think this is sound business and we had an agreement on it. I think it's time to see where we stand. Now, then, if—if you got problems otherwise, I don't think you need to let our agreement get drug into the other thing. (R. 644, A23,A24).

Petitioner: If you feel like I've mistreated you, I'm sorry, I don't see how or why I have. I haven't bothered you that much. (R. 644, A24).

Moore then stated: You've known me a long time. You know g.d. well if I could do it, I would do.

To this Petitioner responded: I don't doubt it. The question is, if you have been there long enough business-wise, and if some understanding can be reached, I think it's time to reach it. (R. 644-645, A24).

Petitioner: If no understanding can be reached—. (R. 645, A24).

Petitioner: Do you feel like, well, I should be compensated any? (R. 645, A24).

Petitioner: I think what the deal is, why you should talk to me, is what we originally agreed upon. (R. 645, A24).

Petitioner: I think if you would, my situation would be this, I think that if you could come to some satisfactory understanding with me. (R. 645, A24).

Petitioner: Now— If you want to try to come to that, then I'm ready." (R. 646, A25).

REASONS OF DENYING THE WRIT

I. *THE UNITED STATES CONSTITUTION DOES NOT REQUIRE THAT A STATE GRAND JURY INDICTMENT CHARGING THE VIOLATION OF A STATE STATUTE FOLLOW THE DISJUNCTIVE-CONJUNCTIVE PLEADING RULE USED IN FEDERAL COURTS.*

Petitioner was indicted by the Grand Jury of Montgomery County, Alabama, in a three-count indictment on August 8, 1975. Count I of the indictment charged petitioner with inciting another to commit bribery in violation of Title 14, §326(a-l)-(a-2), Code of Alabama 1940 (Recompiled 1958) (1971 Cum. Supp.),[4] and Title 14, §63, Code of Alabama 1940 (Recompiled 1958)[5]. At the trial of the case in

[4]Presently codified as Code of Alabama 1975, §§13-9-40 and 13-9-41.

[5]Presently codified as Code of Alabama 1975, §13-5-30.

Montgomery County Circuit Court, the state elected to go to the jury on Count I only, and petitioner was found guilty thereon.

Count I charges that petitioner unlawfully incited "John Moore, Rex Moore, or Charles Price" to bribe petitioner as President of the Alabama Public Service Commission in connection with a telephone rate increase petition then pending before the Commission. The nature and amount of the bribe is specified, and the specific rate increase petition to be influenced by the bribe is identified by title and by Commission docket number. The allegations of Count I are sufficient to have adequately apprised petitioner of the charges against him and they are sufficient to protect petitioner from being put in jeopardy for the same offense at any subsequent time.

The names John Moore, Rex Moore, and Charles Price are connected in Count I with the disjunctive "or", rather than with the conjunctive "and". Title 15, §247, Code of Alabama 1940 (Recompiled 1958)[6], expressly permits the alternative allegation of different means in the same count of an indictment. According to rules of Alabama pleading, alternatives pled in the same count of an indictment are connected with the disjunctive "or". *See, e.g., Ingram v State*, 241 Ala. 166, 3 So.2d 431 (1941); *Echols v. State*, 35 Ala. App. 602, 51 So.2d 260 (1951); *Bishop v. State*, 19 Ala. App. 326, 97 So. 169 (1923).

Dictum in *In Re Confiscation Cases*, 20 Wall. 92, 87 U.S. 92 (1873), and the holdings in some of the lower federal court cases cited in petitioner's brief concern the disjunctive-conjunctive rule of pleading used in federal courts. Accord-

[6]Presently codified as Code of Alabama 1975, §15-8-50

ing to the requirements of this rule, when a federal statute lists several acts which are prohibited and connects them with a disjunctive "or", they can only be pled alternatively in an indictment by using the conjunctive "and". *E.g., Price v. United States,* 150 F.2d 283 (5th Cir. 1945); *Troutman v. United States,* 100 F.2d 628 (10th Cir. 1938); *O'Neill v. United States,* 19 F.2d 322 (8th Cir. 1927). Although this pleading requirement was apparently originated for the information and protection of the defendant, it has been repeatedly held that proof of any of the conjunctively pled alternatives is sufficient to convict him. *E.g., Turner v. United States,* 396 U.S. 398 (1970); *Crain v. United States,* 166 U.S. 625 (1896); *Price v. United States, supra; Troutman v. United States, supra; O'Neill v. United States, supra.* In other words, for purposes of proof and variance under federal indictments "and" means "or".

The peculiarly inefficacious nature of the purported distinction between "or" and "and" in federal pleadings has not escaped the attention of the commentators. As Professor Wright has noted:

> This pleading distinction offers very little protection to a defendant—and is primarily a trap for the draftsman who uses statutory language without thinking to change an "or" to "and"—in view of the rule that defendant can be convicted if the proper proof shows he has committed the offense by any one of the several means alleged. . . . 1 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Criminal §125, at 240-241 (footnote omitted).

None of the cases cited in petitioner's brief holds that the disjunctive-conjunctive rule of federal pleading is constitutionally mandated. Each of those cases is a case in which a federal indictment or complaint charging the violation of a federal statute was tried in federal court. None of the cases apply the rule to prosecutions in state court, because the rule is merely one of federal court pleading.

Some of the cases do suggest that the original purpose of the disjunctive-conjunctive pleading rule was to provide more information to the defendant about the nature of the charges against him and to provide greater protection to him against the dangers of double jeopardy. The federal rule does not serve either of these objectives any better than the Alabama pleading rule which petitioner attacks. In federal pleadings, when an indictment tells the defendant "and", it really means "or". On the other hand, the disjunctive pleading used in Count I in this case provided petitioner with as much or more information, because when an Alabama indictment tells a defendant "or" it really means it. The four retained attorneys who represented petitioner before and during his trial were experienced Alabama trial lawyers. As their numerous pretrial pleadings evidence, they were quite familiar with the rules of Alabama criminal pleading. They knew petitioner was charged alternatively in Count I of the indictment, and they were thereby informed that petitioner would have to defend on each alternative allegation. If the conjunctive "and" had been used instead of the disjunctive "or", petitioner and his attorneys would not have been any better informed.[7]

Some authorities have noted that the only useful function of the disjunctive-conjunctive rule of federal pleading is that

[7]As a matter of well-established Alabama practice even when the conjunctive "and" is pled, it is construed as being used in the sense of the disjunctive "or". **E.g., Sanford v. State,** 8 Ala. App. 245, 62 So. 317 (1913).

it may somehow increase the double jeopardy protection afforded a defendant. 1 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Criminal §125, at 241; *see also, United States v. Laverick,* 348 F.2d 708, 714 (3rd Cir. 1965). The disjunctive-conjunctive rule of federal pleading does not provide any greater protection against double jeopardy than the method of alternative allegation used in Count I of the indictment in this case. Petitioner cannot be subjected to later jeopardy on any one or more of the alternatives alleged in Count I. The test of former jeopardy scrupulously applied in Alabama courts is whether evidence necessary to sustain a later indictment would have been sufficient to convict under an earlier one. *E.g., Campbell v. State,* 246 Ala. 286, 20 So.2d 878 (1945); *Gandy v. State,* 42 Ala. App. 215, 159 So.2d 71 (1963), cert. den. 276 Ala. 704, 159 So.2d 73, cert. den. 377 U.S. 919. Since proof of any of the three alternatives alleged in Count I would have been sufficient to convict, petitioner is protected from being put in jeopardy on any of the three alternatives in a subsequent indictment.

Petitioner argues in his brief that permitting disjunctive allegations negates the possibility of a fair appellate review, since it is theoretically possible that the jury convicted petitioner on the basis of an alternative which the Alabama Court of Criminal Appeals found not to have been supported by the evidence. Petitioner's brief at 9-10. Such an argument hardly justifies raising the disjunctive-conjunctive rule of federal pleadings to constitutional dimensions. Exactly the same sort of speculation is possible under the federal pleading rule, because proof of any of the alternatives alleged in a single court of a federal indictment is sufficient for conviction. *E.g., Turner v. United States, supra; Crain v. United States, supra; Price v. United States, supra; Troutman v. United States, supra; O'Neill v. United States, supra.*

In the face of this strong federal rule on the sufficiency of alternative proof, petitioner argues that the rule is only applicable to cases in which the indictment alleges different means of committing an offense. Petitioner's brief at 10. The cases petitioner cites do not hold that the rule is inapplicable to alternative allegations of different acts. In fact, *Turner v. United States, supra* at 420, holds exactly to the contrary. In that case, this Honorable Court said:

> The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, as Turner's indictment did, the verdict stands if the evidence is sufficient with respect to anyone of *the acts* charged. [footnote citations omitted] Here the evidence proved Turner was distributing heroin. The status of the case with respect to the other allegations is irrelevant to the validity of Turner's conviction. . . . (Emphasis added).

In any event, petitioner's attempted distinction between acts in favor of means is irrelevant to this case because, as discussed *infra,* Count I does involve the alternative allegation of different means as opposed to different acts.

Petitioner's argument that the rule in *Turner v. United States,* does not apply when alternatives are alleged in the disjunctive is nothing more than an attempt to exploit the confusing semantics surrounding the federal disjunctive-conjunctive pleading rule. As was discussed *supra,* under that rule the conjunctive "and" really means the disjunctive "or", because proof of any of the alternative allegations joined conjunctively with "and" is in fact sufficient. The prosecu-

tion can obtain a conviction by proving the first alternative alleged, "or" the second alternative alleged, "or" the third alternative alleged. Alabama pleading is different only in the straightforwardness with which the disjunctive "or" is used to mean that either of the alternatives alleged can be proven.

In summary, application of technical rules of federal pleading to this case would not have altered the protection afforded any substantive right of the petitioner. More importantly, the United States Constitution does not require that federal rules of pleading be followed in state courts.

Petitioner also complains about the complexity of what he calls "the ultimate theory of prosecution" in this case. Petitioner's brief at 9. The complexity in this case stems not from any aspect of Alabama law or pleading, but rather from the twisted machinations of petitioner's own corrupt scheme. The petitioner himself involved John Moore, Rex Moore, and Charles Price in a tammany circle of greed which he used to pervert his public trust. He alone is responsible for its complexity.

II. *PETITIONER'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS NOT VIOLATED IN THAT HIS CONVICTION WAS AMPLY AND SUFFICIENTLY SUPPORTED BY COMPETENT EVIDENCE PROVING EACH ELEMENT OF THE CRIME CHARGED AGAINST HIM BEYOND A REASONABLE DOUBT.*

A. Petitioner half-heartedly attempts to argue that he was deprived of the due process of law because his conviction was totally devoid of any evidence. The foregoing State-

ment of the Case unequivocally demonstrates that there was ample and overwhelming evidentiary support for petitioner's conviction. A more detailed and specific discussion of the evidence will result in an even clearer portrayal of the overwhelming evidence of petitioner's guilt and render meaningless the ill-fated and specious argument of the petitioner.

Before looking at this evidence, respondent feels compelled to make some necessary observations. First, the Alabama circuit court judge considered the State's evidence and found it to be sufficient.[8] The Alabama Court of Criminal Appeals reviewed the evidence and also found it to be sufficient to support the verdict. *Hammond v. State*, Ala. Cr. App. 354 So.2d 280, 287-289 (1977). Finally, the Alabama Supreme Court quashed the Writ of Certiorari as being improvidently granted after considering the sufficiency of the evidence. *In re Hammond v. State*, Ala., 354 So.2d 294 (1977).

Secondly, we need to quickly dispense with any notion that the Alabama Court of Criminal Appeals, by using the words ". . . bare minimum standards to support the verdict of the jury", *Hammond v. State*, Ala. Cr. App. 354 So.2d 280, 291, (1977) deprived petitioner of due process or meant or initiated any lower standard of proof in criminal cases. The obvious import of the words, ". . . bare minimum standards to support the *verdict of the jury*" is that the evidence proved petitioner's guilt beyond a reasonable doubt and to a moral certainty as only that standard of proof and burden can support the verdict of a jury. This interpretation is supported by other parts of the Court's opinion where they talk of

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[8]At the close of the State's case, petitioner moved to exclude the State's evidence which is a proper way in Alabama to question and attack the sufficiency of the State's evidence. Petitioner's motion was denied. (R. 670).

the evidence being sufficient for conviction only if it proved an element beyond a reasonable doubt. *Hammond v. State*, Ala. Cr. App. 354 So.2d 280, 289 (1977). Moreover, when read in context with the preceding sentence, which reads, ". . . The evidence that appellant incited Price to bribe him . . ." is far from overwhelming, the Court was obviously commenting on the *weight of the evidence and its legal sufficiency*, not establishing a new standard of proof or suggesting that only a bare minimum of evidence, less than evidence beyond a reasonable doubt or to a moral certainty, convicted petitioner. Again, the Court was not adopting a bare minimum standard of evidence to sustain a conviction, rather the Court was commenting that the evidence was enough to support the verdict of the jury which must be based on evidence shown to be beyond a reasonable doubt and to a moral certainty.

Thirdly, petitioner relies on the cases of *Garner v. Louisiana*, 368 U.S. 157, 7 L.Ed.2d 207, 82 S.Ct. 248 (1961) and *Thompson v. City of Louisville*, 362 U.S. 199, 4 L.Ed.654, 80 S.Ct. 624 (1960). Both of these establish the principle that a conviction is void and is violative of due process guaranteed by the Fourteenth Amendment to the United States Constitution if it is totally devoid of evidentiary support. *Thompson v. City of Louisville*, supra, 362 U.S. 199. However, it is important in analyzing these cases to remember that a conviction will be rendered void only where there is no evidence at all. A conviction will not be rendered void where there are only questions concerning the sufficiency of evidence duly presented which tend to prove the crime charged. *Thompson v. Louisville*, supra, 362 U.S. 199. As stated in *United States v. Commonwealth of Pennsylvania*, 316 F.2d 841, 842-843 (3rd Cir. 1963):

"The sole question before us is whether this appeal

is within the rule of *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960) and *Garner v. Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961). The Court held in these opinions that it is a denial of due process for a state to convict someone upon no evidence of guilt. The Court, however, was careful to point out that '[d]ecision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all' . . . Thus, the pivotal point of our inquiry is whether the conviction of DeMoss rests upon *'any evidence' which would support the finding that he committed the crime charged*. . . ." (Cases omitted) (Emphasis added)

Or as stated in *Grundler v. State of North Carolina*, 283 F.2d 798, 801 (4th Cir. 1960), wherein the Court was discussing *Thompson*, supra:

> ". . . There is a difference between a conviction based upon evidence deemed insufficient as a matter of State criminal law, and one so totally devoid of evidentiary support as to raise a due process issue. It is only in the latter situation that there has been a violation of the Fourteenth Amendment, affording the State prisoner a remedy in federal court on a writ of habeas corpus."

Likewise, the sufficiency of the evidence does not present a due process question where there is conflicting evidence supporting the conviction. *Talavera v. Wainwright*, 547 F.2d 1238, 1239 (5th Cir. 1977). See also *Sheppard v. Maxwell*, 346 F.2d 707, 737 (6th Cir. 1965); *Moore v. Beto*, 370 F. Supp. 469, 473 (S.D. Tex. 1970) (Due process not violated

as long as there is *some* evidence to support a State criminal conviction. Accord: *United States ex rel Jenkins v. Bookbinder*, 291 F. Supp. 87, 92 (E.D. Pa. 1968) and *United States v. Myers*, 240 F.Supp. 373, 374 (E.D. Pa. 1964).

Since the testimony here shows that there was legally sufficient evidence to support the verdict of the jury, let alone some evidence, petitioner's cases are inapplicable. An even casual comparison of *Garner* and *Thompson* to the instant case easily shows how it is impossible for those cases to be authority for reversing this case. Similarly, a comparison of kindred cases from this Court since *Garner* and *Thompson*, supra, e.g. *Vachon v. New Hampshire*, 414 U.S. 478, 38 L.Ed.2d 666, 94 S.Ct. 664 (1974); *Gregory v. Chicago*, 394 U.S. 111, 22 L.Ed.2d 134, 89 S.Ct. 946 (1969) to the instant case also easily shows how those cases would be inapplicable.

In closing, we would submit that petitioner's argument is common and frequently advanced, but rarely accepted by the federal courts. See e.g. *Bond v. State of Oklahoma*, 546 F.2d 1369, 1377 (10th Cir. 1976); *Brooks v. Rose*, 520 F.2d 775 (6th Cir. 1975); *Cunhu v. Brewer*, 511 F.2d 894, 898-900 (8th Cir. 1975) cert. den. 432 U.S. 857, 46 L.Ed.2d 83, 96 S.Ct. 108 (1975); *Nolen v. Wilson*, 372 F.2d 15, 18 (9th Cir. 1967), cert. den. 387 U.S. 948, 18 L.Ed.2d 1337, 87 S.Ct. 2085 (1967); *Martinez v. Patterson*, 371 F.2d 815 (10th Cir. 1966); *Moore v. Beto*, supra; *United States ex rel. Hardy v. Brierley*, 326 F. Supp. 364, 370 (E.D. Pa. 1971), aff'd 458 F.2d 38 (1972); *United States ex rel. Flowers v. Rundle*, 314 F. Supp. 793, 794-795 (E.D. Pa. 1970).

One final point before we discuss the evidence. Petitioner briefly and unconvincingly, without any analysis of the

indictment, opines that the indictment alleged three separate factual transactions, each of which are capable of stating a separate offense. Petitioner must adopt this tortured view to get around the well entrenched principle allowing allegations of disjunctive means of committing an offense. This is exactly what occurred here. Count One is merely an example of allegations concerning different means of committing the offense of Inciting a Felony, to wit: Bribery.

The indictment's allegations recognize that the offense could have been committed, and its commission was possible, through the incitement of either Rex Moore, John Moore or Charles Price. Petitioner's incitement could have accomplished through either of the Moores or through Price. The indictment alleged different means, wisely so, to cover the tendencies of the evidence, once adduced. Alleging that the crime could have been accomplished by the incitement of either of the Moores or Price was no different than alleging that a murder was committed by cutting one with a knife or stabbing one with a file. Here, the incitement to a felony, to wit: Bribery, as opposed to the murder, could have been accomplished by inciting either of the Moores or Price, as opposed to accomplishing the murder by cutting with a knife or stabbing with a file.

What made the alternative means possible was the existence of a interrelated scheme involving both the Moores and Price. As the Statement of the Case demonstrated, as well as the evidence to follow, petitioner's dealings with the Moores and Price were not disparate or unrelated to each other. They were inextricably woven to complete a common end: the obtainment of money for help in placing machines. Petitioner's dealing with the Moores was only made meaningful when viewed with his relationship and dealings with

Price, and vice versa. Petitioner's activities with the Moores, and then his activities with Price, must be viewed as parts of a whole, unified and single transaction. This single transaction, like murder being a single transaction, depended on its completion of the incitement of one of three individuals, just as the murder's completion depended on a file or a knife. The fact that at trial the evidence shows a knife was used rather than a file, does not render the indictment bad because of the alternative indictment nor the conviction bad because no evidence showed the use of a file. Likewise, the indictment and conviction here are proper as the evidence eventually showed the means of committing the crime to be the incitement of Charles Price.

B. Petitioner claims there was no evidence whatsoever proving the allegation that he incited Price to bribe him with the intent to influence petitioner's vote on the pending rate increase. The following amply demonstrates the existence of substantial evidence proving this element of the crime.

Price testified that in the last quarter of 1974 petitioner sought his aid in placing the Moores' vending machines in some telephone company buildings. (R. 385-386) After several conversations between petitioner and Price regarding the placement of the Moores' vending machines, Price called the district plant manager and the Moores' machines were, in fact, placed in telephone company buildings in Montgomery. (R. 386-388).

Several months later, the subject of vending machines was again brought up by petitioner. This time, however, he wanted Price to take the machines out. *Petitioner began to talk to Price about getting the machines out only after South Central Bell had filed a rate increase with the Alabama Public Service Commission* (R. 391). (Emphasis added) The rate increase was filed in February of 1975 and petitioner began talking to Price about the machines' removal in April of 1975 (R. 390-391).

Price testified that at first he did nothing to get the machines out. However, Price also testified that petitioner continued to talk to him about removing the machines and that he needed to do something about this problem. As stated by Mr. Price:

> "Q: Did you take them out or take any steps to get them out?
>
> "A: Not immediately, this went on, you know, several times, and finally it got right obvious he was pushing pretty hard and I needed to do something." (R. 390, A2).

According to Price's testimony, Petitioner at first only told him to get the machines out because the Moores were a bunch of crooks (R. 391). At first nothing was mentioned by petitioner about Price's company getting "what it needed." And consequently, at first, Price did nothing about trying to get the machines removed (R. 391).

As a matter of fact, Price did nothing for approximately three months to get the machines removed, even though petitioner talked to him about that very subject each time they met during that period.

Around the first of July, Price testified he finally went to see the Moores (R. 392). Price recalled that immediately prior to this first visit, petitioner told him:

"We are not going to get along and you are not going to get what you need." (R. 393, A3).

Therefore, after being pressured by petitioner for three months and after being told that, "You are not going to get what you need," Price went to see the Moores. *And of importance, almost beyond description, this conversation about Price not getting what he needed took place approximately one week before hearings were to be started concerning Bell's rate increase before the Alabama Public Service Commission, the very agency of which petitioner was President.* (R. 396) (Emphasis added).

It does not end here. There is even more evidence on this element. Petitioner and Price had known each other for six to eight years and Price's duties with South Central Bell included him being the head liaison to and lobbyist with the Public Service Commission (R. 383,385). Therefore, when a rate increase from his company was pending, it was his responsibility to see that it faired favorably with the Public Service Commission. This is an important circumstance in analyzing petitioner's statements about Price not "getting what the company needed." Moreover, there is absolutely no evidence that South Central Bell "needed" anything else or had anything else pending before the Public Service Commission other than the rate increase. Therefore, references to "getting what you need" obviously refer to that rate increase.

It is of paramount importance to note from the above elicited testimony that Price did nothing at first to remove the machines. It was only after petitioner told him "We are not going to get along and you are not going to get what you need" that Price went to see the Moores (R. 393). Up

until that point, petitioner had mentioned nothing about Price "getting what he needed." It is vitally significant that Price reacted only after being told he would not get what he needed. Based on Price's job duties and the pendency of a rate request before the Commission petitioner headed, it is obvious petitioner meant the rate increase. Any question is resolved when it is remembered that the petitioner told Price about him not getting what he needed, for the first time, *only one week before hearings were to begin on the rate increase*. Having failed to persuade Price to go see the Moores by simply asking him to get the Moores to remove the machines, petitioner, timing his base and vile conduct perfectly, had to finally resort to threatening Price regarding the rate increase. Only by threatening destruction to a matter so crucially important to Price and his employer, could petitioner force Price to be the pawn in his avarice game of coercing money from the Moores.

Finally, is another equally telling piece of evidence. As Price openly related, he thought petitioner was referring to the rate increase. From Price's testimony we observe:

> "As I recall, I told the Moores that I was sorry that I didn't want to take the machines out, I knew they had a big investment, *but our company had a big investment, and there was a lot at stake for us* and for them, but they needed to get with Mr. Hammond and whatever their problems were, they needed to get them worked out." (R. 396-397, A5). Emphasis added)
>
> • • • •
>
> "Well, we did have a rate increase pending for fifty-nine million dollars and if we had a commissioner

that was made (sic) at us, we didn't know whether we could get a fair hearing or not." (R. 397-398, A5).

* * * *

"Q: And you were—you were afraid that some vending machines was going to affect Commissioner Hammond's vote?

"A: Yes, sir." (R. 411, A7).

Because the words "rate increase" were never used does not mean the evidence neglects to prove, in fact, that petitioner incited Price with the intent to influence him on the pending rate increase. Telling Price he would "not get what he needed", certainly is ample proof, beyond a reasonable doubt, that petitioner was threatening Price with an adverse disposition on the rate increase, especially when one considers the same was pending, with hearings to begin on its merits shortly.

In closing, we hasten to add that the Alabama Court of Criminal Appeals certainly felt that petitioner incited Price with the intent to influence petitioner on the pending rate increase. As stated by the Court:

> "It is clear that Price acted on several occasions with the intent to influence appellant's [petitioner's] official actions as such actions related to Bell's business."

Hammond v. State, Ala. Cr. App., 354 So.2d 280, 288 (1977).

C. Finally, petitioner alleges that there was no evidence whatsoever proving that petitioner incited Price to

corruptly offer, promise or give petitioner anything of value. Again, petitioner's contentions are without merit as ample evidence was adduced on this element from which the jury could find petitioner guilty beyond a reasonable doubt. The Alabama Court of Criminal Appeals, as with the element discussed in Part B supra, found that evidence sufficient to support the verdict of the jury existed as to this element. As explained by the *Hammond* Court:

> ". . . However, the jury heard the witnesses and observed their demeanor. They listened to the testimony of the Moores, Price and of the appellant [petitioner]. 'It could properly be found upon the evidence together with the inferences, which need not be necessary or unescapable (sic.) so long as they were reasonable and warranted, that it had been proved beyond a reasonable doubt,' that the appellant intended that this threat, transmitted through Price, would cause the Moores to give in and pay him money . . . Price's action could thus be considered 'a thing of value' to appellant." (Cases omitted).

Hammond v. State, 354 So.2d 280, 289, (1977).

This finding by the Court, after an admitted review of the evidence presented, is enough to preclude any further inquiry into whether evidence existed as to this element. However, unabashedly, the respondent submits the following evidence which abundantly reinforces the Court's conclusion.

As a logical starting point in analyzing the Court of Criminal Appeals' finding relating to Price's actions being a thing of value to petitioner, we must again examine the arrangement and relationship between the petitioner and the

Moores. This arrangement was quite simple. In exchange for his help in getting Tops Vending Machines placed, petitioner wanted a commission or kickback from the Moores. Not only did Rex Moore testify that petitioner wanted money for placing the machines, (R. 305, 308), he stated that after the machines were placed, he began hearing quite frequently from petitioner, who each time wanted money, either in a lump sum or in monthly installments. (R. 310, 312, 313)

Also, it is clear from the taped conversation which occurred between petitioner and Rex Moore at Gowan's Truck Stop on July 8, 1975,, a conversation petitioner admits participating in, that there existed an arrangement between petitioner and the Moores where petitioner was to be paid money (R. 622-632, 631-646). [Petitioner himself admits to the correctness of the tape and transcript of this conversation. (R. 576, 622)].

Moreover, the existence of this arrangement can also be seen from the fact petitioner twice received money from the Moores; both times after the vending machines were placed in the Bell buildings (R. 173, 313).

With this background, we can better understand the significance of petitioner's insistence to Price to see the Moores. Petitioner had repeatedly asked Rex Moore for money after the machines were installed. According to Moore, he asked him about money every time he saw him (R. 310-313). *And it is obvious from Petitioner's testimony and the tape that he expected money.*

Having only secured two payments through his own efforts, petitioner now employed Price to carry out his evil deed. As stated, petitioner had been trying to pressure the Moores to pay him for three months or longer. Therefore,

it is clear that petitioner's intent in sending Price to see the Moores was to get them to pay money. There is no reason to believe that he had any other intention. Why send a man in Price's position to talk to the Moores, and threaten him with unfavorable action concerning his company's rate increase if he did not, just to get some machines removed? Obviously, petitioner intended Price to be a lever to pry money loose from the Moores. If petitioner simply wanted the machines removed, why did he not have Price call the district plant manager who had arranged for the machines placement instead of insulting and threatening Price to go see the Moores directly?

It is obvious that Price interpreted petitioner's conversations with him to mean that petitioner wanted *something* other than the removal of the machines. Further, it is obvious from his testimony that Price was threatening and pressuring the Moores to pay petitioner, that the machines were being used as the pressuring device. This pressure, supplied by Price, certainly was of value to petitioner as he viewed it as a sure way to get his money from the Moores. Price efficiently delivered the message: Pay or get the machines out. As stated by Price:

> "As I recall, I told the Moores that I was sorry that I didn't want to take their machines out, I knew they had a big investment, but our company had a big investment, and there was a lot at stake for us and for them, *but they needed to get with Mr. Hammond and whatever their problems were, they needed to get them worked out.*" (R. 396-397, A5) (Emphasis added).
>
> "When he got off the telephone, Johnnie Moore and I walked out front, and I told him, I said, 'Look, I don't

know what the problem is between you and Mr. Hammond, but he's on my back to take the machines out. I don't want to take them out, so you all get your problems settled." (R. 394, A4).

It is also obvious from the testimony that petitioner himself did not want the machines removed but instead wanted the Moores to pay him and live up to their agreement. This is demonstrated by the following:

1. Charles Price testified as follows:

"And you say that Mr. Hammond said that you are not going to get what you need or words in effect to that, unless these people do—*live up to their agreement?*

"A: It was words to that effect; yes, sir.

"Q: Mr. Hammond told you that?

"A: Yes, sir." (R. 397-398, A5,A6) (Emphasis added)

2. After Price visited the Moores, he reported back to petitioner. Petitioner did not ask whether the machines had been removed, or whether plans had been made for their removal. Rather, he was pleased when Price told him that the Moores would be in touch with him. As a matter of fact, after he learned the Moores would be contacting him, he no longer insisted that Price remove the machines, obviously thinking that the Moores would now begin to pay him.

Further, not only would the act of the Moores getting in touch with petitioner be completely unrelated to any action

leading to the machines removal, but petitioner expressing satisfaction over that act demonstrates an intent on his part totally inconsistent with his wanting the machines removed or "to get the machines out." As related by Price:

"A: Yes, sir. After I talked to Johnnie Moore, I went back to see Mr. Hammond, and I said that I had talked to Johnnie and they said they would be in touch with you."

* * * * *

"Q: All right. And when you went back and saw Kenneth Hammond after having seen the Moores and told him what you—you told him, you thought Johnnie Moore would be in touch with him, *did Mr. Hammond say then to get the machines out?*

"A: *No, sir, he said, fine.* (R. 422-423, A9) (Emphasis added)

3. No interpretation can be given the testimony of petitioner or the taped conversation between him and Rex Moore at Gowan's Truck Stop on July 8, 1975 other *than that petitioner was expecting the Moores to pay money, not that he wanted the machines removed.* During the taped conversation with Rex Moore, petitioner kept asking about their agreement; that the Moores had had enough time; that petitioner wanted them to live up to their agreement; and that petitioner wanted his money. (See Statement of the Case, testimony of petitioner, supra). It is interesting that petitioner's insistence on money and the Moores' living up to their agreement, which is evident on the tape, occurred only a few days after Price had told petitioner the Moores would be contacting him. It is interesting that the conversa-

tion of July 8, 1975 occurred only a few days after Price went to see the Moores.

Clearly then, the actual events and occurrences that took place demonstrate and prove that petitioner incited Price to corruptly offer, promise or give the petitioner a thing of value. Petitioner pressured Price to see the Moores for the purpose of relaying his threats and intentions to them. As a result of Price seeing the Moores, Price informed the petitioner that the Moores would be contacting him. As a result of Price seeing the Moores, petitioner and Rex Moore met, at least as far as petitioner was concerned, to discuss their prior agreement and the payment of money to petitioner, not the removol of machines. In actuality then, not only did petitioner incite Price to corruptly offer, promise, or give him something of value, that "value" actually materialized when petitioner met Rex Moore to discuss, as far as petitioner knew, illegal payments to him. Consequently, petitioner received something of value from Price.

CONCLUSION

Based on all the foregoing authority, both legal and factual, the State of Alabama, respondent, respectfully submits that there is no merit in any of the contentions raised by petitioner and his Petition for Writ of Certiorari to this Honorable Court ought to be and is due to be denied.

Respectfully submitted,

WILLIAM J. BAXLEY
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By:

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ED CARNES
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CERTIFICATE OF SERVICE

I James S. Ward, one of the attorneys for the respondent and a member of the Bar of the Supreme Court of the United States hereby certify that on this 8th day of June 1978, I did serve the requisite number of copies of the foregoing Brief and Argument of respondent and Appendix on the Honorable James F. Neal, the Honorable James V. Doramus and the Honorable Thomas H. Dundon, Neal & Harwell, 800 Third National Bank Building, Nashville, Tennessee, 37219, attorneys for petitioner, by mailing said copies to them at the aforesaid address with the postage prepaid.

JAMES S. WARD
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250 Administrative Building
Montgomery, Alabama, 36130

APPENDIX A

STATE OF ALABAMA)
)
MONTGOMERY COUNTY)

I, Mollie Jordan, Clerk of the Court of Criminal Appeals of Alabama, do hereby certify that the foregoing pages numbered 390, 393, 394, 396, 397, 398, 399, 411, 422, 423, 622, 623, 624, 625, 626, 628, 629, 631, 632, 633, 634, 635, 636, 637, 639, 642, 643, 644, 645, and 646, contain full, true and correct copies of those pages of the record on appeal in the cause of Kenneth Hammond, alias v. State of Alabama, Montgomery Circuit Court Number 12359, 3 Div. 444, as the same appear and remain of record and on file in this office.

WITNESS, Mollie Jordan, Clerk of the Court of Criminal Appeals, this 29th day of May, 1978.

MOLLIE JORDAN
CLERK, COURT OF CRIMINAL APPEALS
OF ALABAMA

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why do you want me to take them out?"

And, as I recall, he said, "They are a bunch of crooks and get the machines out."

Q Did you take them out or take any steps to get them taken out?

A Not immediately, this went on, you know, several times, and finally it got right obvious he was pushing pretty hard and I needed to do something.

Q Now, approximately when did Mr. Hammond start after you to get the machines out? In your best judgment?

A It's back in — in my best judgment and this is trying to think back, I would say probably during April, probably during April of this year.

Q Probably during April. Did he get more and more insistent as time went by and they weren't taken out?

MR. BEATY: We object to that as leading, more and more.

THE COURT: Don't lead your witness.

Q Just tell what all Mr. Hammond would say to you about getting them out?

A Well, first it was just "get them out". And, "They are a bunch of crooks", and then, like I say, really got to where a lot of pressure was put on me until it got obvious if I didn't do something —

MR. BEATY: We object to his interpretation of obvious, that calls for a mental conclusion of this witness

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words to that effect?

MR. BEATY: We object to that as leading, Your Honor, and siggestive. The witness has answered the question, and now —

THE COURT: Ask him what he said.

MR. BAXLEY: All right.

THE WITNESS: The best of my recollection what was said is, "We are not going to get along and you are not going to get what you need." He did say that.

BY MR. BAXLEY:

Q "Or not going to get what you need"?

A. Yes.

Q I'll ask you whether or not Mr. Hammond ever mentioned to you anything about an envelope with regard to Tops Vending Company or the Moores?

A He mentioned one that John Moore had given him.

Q What, if anything, and when was that occasion?

A It was during this same period of time, but I don't recall exactly when it was.

Q What, if anything, did he say?

A He said that John Moore had given him an envelope but there wasn't in it what he was told was going to be in it.

Q That John Moore had given him an envelope but there wasn't in it what he was told was going to be in it.

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Kenneth Hammond said that to you?

A Yes, sir.

Q So, sometime, then, around the first of July, you went to the Tops Vending Company place here?

A Yes, sir.

Q And up to that point, had you ever, to your knowledge, met or seen Rex Moore?

A No, sir.

Q Up to that day, had you ever, to your knowledge, seen Johnnie Moore?

A No, sir.

Q And what happened when you got out to Tops Vending Company?

A Well, I got there and asked for Rex Moore, and was told by one of the men in the office that we was in the hospital. And I asked who was running the place and they said Johnnie Moore was running it and he was there, on the telephone.

When he got off the telephone, Johnnie Moore and I walked out front, and I told him, I said, "Look, I don't know what the problem is between you and Mr. Hammond, but he's on my back to take the machines out. I don't want to take them out, so you all get your problems settled."

MR. SIKES: May it please the Court, we ask that that be stricken as another hearsay statement, it is not in the presence of the

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hearing for a rate increase was going to resume before the Public Service Commission?

A Mr. Baxley, I'm not sure when that date is, it's a matter of record, and I could get it, but I'm not sure when the date was that the hearing started. It was soon after that; yes, sir.

Q I'll ask you if you apologized to the Moores for having taken the machines out, or if they didn't get with Hammond?

A Yes, sir.

MR. BEATY: Now, we object to any conversations between he and the Moores, if the Court please, outside of the presence of Mr. Hammond, and it's hearsay.

THE COURT: I overrule your objection. I will let him testify to what he said and not what the Moores told

him.

MR. BEATY: We except.

THE WITNESS: As I recall, I told the Moores that I was sorry that I didn't want to take their machines out, I knew they had a big investment, but our company had a big investment, and there was a lot at stake for us and for them, but

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they needed to get with Mr. Hammond and whatever their problems were, they needed to get them worked out.

BY MR. BAXLEY:

Q Did you tell them, to refresh your recollection in substance, that you were sorry, but you were caught in a position where it was the financial health of your company against the financial health of Moores' company?

A Yes, sir.

MR. BEATY: We object to that, that's suggesting a different answer.

THE COURT: I sustain the objection. You are leading him now.

Q What was at stake for your company?

A Well, we had a rate case —

MR. BEATY: If the Court please, unless he knows, it's not shown that he knows what's at stake, if the Court please.

THE COURT: I'll let him testify if he knows.

MR. BEATY: Yes, sir; if he knows.

A (continuing) Well, we did have a rate case pending for fifty-nine million dollars and if we had a commissioner that was made at us, we didn't know whether we would get a fair hearing or not.

Q And you say that Mr. Hammond said that you are not

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to get what you need or words in effect to that, unless these

people do — live up to their agreement?

A It was words to that effect; yes, sir.

Q Mr. Hammond told you that?

A Yes, sir.

Q And that was within a matter of days, before you went out to see John Moore the first time?

A Yes, sir.

MR. BAXLEY: Your Witness.

MR. SIKES: Let's have a minute, please, judge.

THE COURT: I'll give you five minutes. (At this time there was a short recess.)

CROSS EXAMINATION

BY MR. SIKES:

Q Mr. Price, you testified that you are Assistant Superintendent of the South Central Bell Telephone Company?

A Yes, sir.

Q To whom do you report?

A Ben Brown.

Q Would you tell the ladies and gentlemen who Mr. Ben Brown is?

A He is vice president of Alabama.

Q Does that mean he heads up the Alabama operation?

A Yes, sir.

Q All right, sir. He's as high up as you can get

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in Alabama?

A Yes, sir.

Q Your duties, as I understand it, as a public affairs expert, is the liaison with all branches of government?

A Yes, sir.

Q Not just the Public Service Commission?

A No, sir.

Q You testified, as I understood it, Mr. Hammond made

a request of you regarding the vending machines at the South Central Bell plant facility between Adams and Washington Street here in Montgomery?

A Yes, sir.

Q Made other requests of you, has he not?

A Has he made other requests?

Q Yes, sir.

A Yes, sir.

Q In fact, frankly and often, hasn't he?

A Yes, sir. Right often.

Q About all kinds of things having to do with the telephone company; is that not correct?

A Yes, sir.

Q Would that also be correct insofar as Commissioner MacDaniel is concerned?

A She has made some requests.

Q All right. Would that be correct so far as Commissioner Zeigler is concerned?

A Yes, sir.

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the Public Service Commission that concern me.

Q And you wanted to keep Commissioner Hammond happy?

A Yes, sir.

Q But you didn't even report this to Mr. Brown?

A No, sir.

Q Well, let me ask you this: Was the sixty million dollars of vital concern to your company?

A Absolutely.

Q And you were — you were afraid that some vending machines was going to affect Commissioner Hammond's vote?

A Yes, sir.

Q He never told you that, did he?
A No, sir; he did not.
Q He never inferred that to you either, did he?
A No, he inferred we weren't going to get along, he said that, but — and — and that we won't get what we needed, but he didn't say that he wouldn't vote for the rate increase.
Q All right, sir. Did he ever tell you that he would act against you?
A No, sir.
Q Your company, now?
A I understand.
Q Ever act against your company?
A No, sir.
Q Did he ever tell you he would vote against your company?
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MR. SIKES: Your witness.

REDIRECT EXAMINATION

BY MR. BAXLEY:

Q Let's see, now, Mr. Sikes asked you about insofar as, something about all Mr. Hammond told you was just to get the machines out, I believe; is that correct?
A Yes, sir.
Q Now, when you went to see Johnnie Moore, as you testified, and told him that to straighten up or get settled or whatever it was with Kenneth Hammond or the machines would have to come out, from the time you went to see Johnnie Moore and told him that, until the time that this blew up and you got arrested, did you go back and have any conversations with Kenneth Hammond?
A Yes, sir. After I talked to Johnnie Moore, I went back to see Mr. Hammond, and I said that I had talked to Johnnie and they said they would be in touch with you.

Q All right, sir. Mr. Price, one other thing, when — how long did you say you been working at the phone company?
A About twenty-six years.
Q Twenty-six years. And what jobs did you start at with them?
A I started off working in the plant department, repairing cables, setting poles and went into the commercial department.
Q In other words, you came up through the ranks?
A Actually, I started on the training program, the
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first job was in the plant department.
Q I see. And one other thing Mr. Sikes asked you about, other people making requests. Other people, other public officials, Public Service Commissioners or anybody else made requests of the nature that Mr. Hammond made?
A Probably not as many, if that's what you mean.
Q All right. And when you went back and saw Kenneth Hammond after having seen the Moores and told him what you — you told him, you thought Johnnie Moore would be in touch with him, did Mr. Hammond say then to get the machines out?
A No, sir. He said, fine.
Q Thank you very much.

MR. BAXLEY: No further questions.

RECROSS EXAMINATION

BY MR. SIKES:

Q Mr. Price, let me ask you this, sir: In working your way up through the ranks, I'm sure that your salary has increased through the years?
A Yes, sir.
Q What was the last position you held prior to becom-

ing Public Affairs Liaison officer?

A I was in the North Alabama Division Manager.

Q All right, sir. What was your salary at that time?

MR. BAXLEY: Your Honor, we object to going into all of that. I don't see what relevancy it has on this case.

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said it.

Q And that is when you decided?

A Somewhere along about that time.

Q Now, Kenneth, I want to ask you, if on July the 8th, —

A Uh-huh.

Q — out here at Gowan's, did you recognize your voice on that tape?

A Yes, sir.

Q Did you recognize Rex Moore's voice?

A I did; yes, sir.

Q And Mr. Beaty asked you, he said that transcript was basically correct, I believe; is that right?

A That's right. I didn't keep the transcript very long, I read it and listened to the tape.

Q I'm saying just what you told Mr. Beaty?

A Yes, sir. It's hard to remember everything that took place out there, Bill.

Q No, I'm just asking you what you told Mr. Beaty.

A Yes, sir. I said the transcript was basically correct.

Q You told Mr. Beaty that?

A Yes, sir.

Q And that was July 8th?

A That's when I was taped out there, according to what you all said.

Q And did, I'll ask you whether or not Rex Moore said on that tape, "Well, if you ain't threatened me, I don't know

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what the hell it's been then," do you remember Rex Moore saying that?

A Rex, out there during that time?

Q Do you remember him saying that?

A Bill, he got into that area so many times, and reword it and rephrase it so many times, now —

Q You do remember him saying that in substance, then?

A Yes, sir. I believe that's on there; yes, sir.

Q Right immediately —

A I won't tell you positively.

Q Right immediately after then when he said that, did you then say, "All I'm trying to do is business with you," did you say that?

A If that's on the transcript, and that's what it is interpreted as on the tape, yes, sir.

Q And that's your voice that said that?

A If it's on there, if it's on there and it's — until somebody proves otherwise.

Q Did you go back and start at the beginning?

A Yes, sir.

Q Just to reiterate, and think exactly what took place, just stop and think, did you say that, right at that point?

A Yes, sir; that's right.

Q Did Rex Moore then say, "I've told you I'm in bad shape, I've told you that not one time, I've told you that a thousand times."

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Do you remember Rex Moore saying that to you right then at that occasion?

A He said this time and time after time, and in that old transcript there, and —

Q Do you recall him saying that?

A Yes, and this is when I —

Q Did — did you then immediately right after then, say, "Physically or otherwise?"

A Physically or mentally, I believe.

Q Did you say physically or otherwise, physically or otherwise?

A It could have been physically or mentally.

Q Did you say physically or otherwise?

A Bill, I don't know. You can tell me he said the words on the tape, I can't tell if he —

Q I'm asking you if you can recall?

A I do know the words got involved, physically or mentally.

Q Did he say "Huh?" And then you say, "Physically or financially," or —

A Bill, if it's on there, it — it would have to stand, subject to being correct, until proven otherwise.

Q Did you say that, did you say that, "Physically or financially, or what?"

A I very easily could have said that, sir, because a lot of his time had been spent talking about his health.

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Q And then did Rex say, "Financially, I've told you that"?

A I believe that's correct, yes, sir.

Q And then did you say, "Well —" and then did Moore interrupt you and say, "Well, it's, it's everytime I turn around, now, it's started on my boys now, and I've gone just as g.d. far as I'm going to go"

A Yes, sir. I realized Mr. Moore was saying all this, and I realized the motive behind it.

Q And then did you say, Kenneth, "I don't reckon I've said anything to your son. He came out here one day and he was supposed to have brought me two hundred dollars, and

brought me a hundred dollars. That's the only thing — that's the last time I've seen him"?

A Uh-huh.

Q Did you say that?

A Yes, sir. That's been acknowledged a half a dozen times, Bill.

Q And did you say the envelope was sealed up?

MR. BEATY: If the Court please, this is not proper cross-examination. It — the jury has heard the tape, they heard the transcript, and Mr. Hammond said that this was basically correct. This is not trying to impeach what was on the transcript.

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THE COURT: Are you objecting?

MR. BEATY: Yes, sir, I'm making an objection.

THE COURT: I overrule your objection.

MR. BEATY: We except.

BY MR. BAXLEY:

Q Did you say right then, after that, "The envelope was sealed up and I came in here and got a cup of coffee and opened it up." Did you say that?

A Yes, sir; that's correct.

Q Did you say then this, "You gave me —" something, a word that's unclear — "that night over there at your pool hall, remember, when I was heading north?" Do you remember saying that?

A Yes, sir. And that was covered earlier in our conversation.

Q And did you say the word that was unclear, that can't be heard on the tape, did you say a hundred dollars?

A That's correct. And I think that's when he said he had no knowledge of it.

Q Did he say it?

A He must have been drunk.
Q Did he say —
A If I recall correctly, that's what he said.
Q And did you say, "You gave me that hundred dollars over there, one night me and you was sitting there talking"?
A That's correct.
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A I cannot recall, the only thing that I told you that I said earlier.
Q Can you remember saying that, did you not say it or do you not recall?
A Him out there—

THE COURT: Do you remember saying it, if you don't just say you don't remember.

MR. SIKES: He already did, he said, "I can't recall." The Attorney General keeps going on.

MR. BEATY: The Attorney General keeps badgering him. Your Honor, I know I'll be out of order saying this —

THE COURT: Don't do that. Just if he does remember what you said, as to any particular thing, all you've got to do is say you don't remember.

THE WITNESS: The question again, Bill.

BY MR. BAXLEY:

Q Did you say, did you say you said, "Let's go back and look at the situation," and he said, "All right."

And did you then say, "See what happened, you remembered when you first called me in '73, me and you went out there," and went on to say, "Your son went with you one time, you were talking about ten or twelve, if the volume was —"
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A I don't — I don't recall, Bill.
Q You don't recall whether you said that or not?

A No, sir. I do know that what was supposed to be on there —
Q Just a minute.

MR. BAXLEY: Your Honor. He can say what he wants to for his lawyers, he can just answer the questions.

THE COURT: Just answer the question. If you don't recall, you don't.

THE WITNESS: I know what happened.

BY MR. BAXLEY:

Q Did Moore say, "Said that." And did you say it right then, "That deal never developed, do you follow me?"
A Yes, sir. That's said.
Q Right after you were talking about the ten or twelve, you said that, you said "That deal never developed, do you follow me"?

MR. SIKES: I've been trying to listen to the State Attorney's questions, and I can't understand whether he's saying does the witness recall having said this, or does the witness recall that's on the transcript.

THE COURT: I think he's talking, as I understand it, and you can correct me if I'm wrong,

BY MR. BAXLEY:

Q All right. Then did you go on and say, Kenneth, a little later on, "No, I just want to get the whole story out and let you see the general background. Then I talked to you in December before I went to San Diego on that trip, and then there was a hold up."

Did you say that?

A Yes, sir; I believe that portion is correct.
Q And did Rex say immediately right then, "I told you I didn't have no money."

And did you immediately say, "No, there was a hold up on them going in — remember?"

A I believe possibly that's correct; yes, sir.
Q And did Rex say, "You held them up", and did you immediately right then say, "Yeah, because we couldn't reach any agreement"?
A Bill, if I recall correctly —
Q Kenneth, do you recall saying that, did you not say it, or do you not recall?
A I consider it a business-like approach and —
Q A business-line approach?
A Yes, sir.
Q Well, then, did you say that?
A And —
Q Did you say that, Kenneth?
A I do know the delay was that they didn't negotiate
536
properly.
Q Did you say that, Kenneth, or didn't you say it or don't you recall whether you said it or not?
A. Now, read that to me again, Bill.
Q Did you say, "No, I just wanted to get the whole story out and let you see the general background. Then I talked to you in December, before I went to San Diego on that trip and then there was a hold up." And then Rex said, "I told you I didn't have no money." I think you admitted that that was said a while ago, and you said, "No, there was a hold up on them going in." Do you remember, and Moore said, "You held them up."
And then, did you say, "Yeah, because we couldn't reach any agreement"?
A If that portion is on the tape.
Q Did you say that?
THE COURT: Do you remember saying that?
Q Do you recall whether you said it or not, Kenneth?

A So much of the tape is unclear.
Q I'm not asking you what's on the tape, I'm asking you if you said it or not, said it or do you remember whether you said it or not?
A I just don't remember saying it, I'll be honest with you.
Q All right. Did Moore then say, "That's right," after you said, "Yeah, because we couldn't reach any agreement,"
537
and did you say, "I was wanting to reach an agreement before I went to San Diego and we didn't"?
And Moore said. "That's right." Do you recall saying that out there?
A Bill, I believe that part, to my knowledge, could be correct.
Q Could be correct. All right.
(At this time there was a short recess.)
BY MR. BAXLEY:
Q Kenneth, right there at that point, when Moore said, "That's right", did you say, "Okay. And then we came back from San Diego —"
A Uh-huh.
Q "— but prior to going out there, the question came up, half of it or all of it. Well, we were discussing the better half. You were right. You said if you got that half, they would give you the other half, and you hit the button on the head"?
A Yes, sir.
Q Did you say that?
A Yes, sir. That's correct, yes, sir.
Q Did you say, "So, at that particular time, we were saying for that first half, two hundred dollars." Talking about two hundred dollars per month?
A That's what he said.

Q No, did you say that, Kenneth, did you say that?
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A Repeat it again, Bill.
Q All of it?
A "That's not two hundred dollars a month, and then what he said on it.
Q Did you say that?
A Read it out.
Q Okay. "Okay. Then we came back from San Diego, prior to going out there, the question come up, half of it or all of it. We were discussing the better half and you were right, you said if you got that half, they would give you the other half, and you hit that button on the head. So, at that particular time, we were saying for that first half, two hundred dollars."
A That's what he had mentioned to me earlier.
Q No, sir. Kenneth, I'm asking you did you say that, or did you not say that or don't you recall whether you said it or not?
A Yes, sir. I believe that's — I said that; yes, sir.
Q You believe you said that. You are talking about two hundred dollars a month, at that point?
A That, why that figure got mentioned is that's what he had said earlier himself.
Q But you said that right there I just quoted?
A Yes, that, that information came from what he said, basically, earlier.
Q Then Moore started talking about the Steak and Egg
539
place, and he said, "I didn't hear anything from you at that time, me and you left down there, on that steak and egg place, and when I got home you called the man. He said, 'I'm sorry you didn't want the other half.' And the next time I heard,

from the phone company, not from you, from the phone company, and said, 'Put the machines in'. Now, whether you had that done or not, I don't know whether you had it done or not."

Do you remember him saying that, right after the two hundred dollars?
A Yes, sir; that's on there, if I recall correctly.
Q And then did you immediately right then say, "You told me the second half would come in and it did. They told me that, they told me exactly when it happened. All of 'em is involved in the same company, and the same situation as you know. Now, we were talking about at that time for a half, we would gather in here, back and forth, every month."

Did you say that?
A Bill, is that directly followed verbatim, the other first part you read?
Q Right. Did you say that then, at that time, or did you not say it or do you not recall it?
A You did not leave any portion of it out?
Q N, sir.
A Will you read it to me one more time, Bill, and I'm not trying to —
Q "You told me the second half would come in and it did,
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they told me that, they told me exactly what happened. Well, all of them is involved in the same company and the same situation as you know. Now, we were talking about, at that time, for a half, we would gather in here, back and forth, every month."
A Well, "gather in here, every month, back and forth"?
Q Did you say that?
A Bill, I believe that's correct; yes, sir.
Q And did you immediately before anybody else said any-

thing, say, "Then, we narrowed it down, agreed on two hundred"?

A I believe that's correct.

Q You said then, "We narrowed it down, agreed on the two hundred"?

A Yes, I believe that's correct, because this is the figure he quoted me.

Q You said that?

A Yes, sir.

Q All right. Now, I'm going to skip over for a while and talk about Frank and Oscar and some money in a tight, and tax people, and at that point, when he's talking about the tax people getting after him, did you say — and he's talking about squeezing —

A Uh-huh.

Q Did you then say, "Well, I don't know whether I've squeezed you too damn much, if you don't make two hundred

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dollars, that's a hell of a squeeze."

A Well, I knew Rex Moore was a con, I knew about his business.

Q I'm not asking you what you knew about Rex Moore, did you say that statement?

A If that's on there, that's what I said; yes, sir.

Q And did he right then at that point, say, "Well, I mean, you know to come out and say you either going to take them out or do this, that and the other, I just want to know that one way or the other." Did you say that right then?

A Bill, I — I don't recall, I'm being honest with you.

Q Did you say right then, at that point, "It's your business, if you want, the proposition is there, now, understand this."

A Uh-huh.

Q Did you say that; it's your —

MR. SIKES: Your Honor, I'm going to pose an objection to that one for this reason, the actual correct quotation, even according to the Attorney General's transcript, which we are not saying is totally accurate, is, By Mr. Hammond: "It's your business, if you want the proposition there, now, I understand this, and er —"

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MR. BEATY: He answered he didn't remember.

MR. BAXLEY: No, he has not answered he didn't remember.

THE COURT: I understood him to answer that he couldn't remember.

MR. BAXLEY: All right, sir.

BY MR. BAXLEY:

Q Well, did you talk a little bit about Pioneer, then, and did Moore say, "You want 'em out?"

And then you immediately say, "I moved them in, I feel like they've been in long enough for you to see the volume, and you know the kind of business you are doing."

MR. BEATY: If the Court please, we want to interpose an objection again. This is not cross examination of what this man said on direct. This is the Attorney General just trying to read in, again, the transcripts that was given to the jury, for them to use for a proper purpose and then take it —

THE COURT: If you are objecting, I overrule your objection.

MR. BEATY: I object. We except.

BY MR. BAXLEY:

Q Ken, did you say that?

A Bill, I'm afraid my answer is going to be to you that,

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Q Kenneth, I'll just ask you this, did you, to shorten matters, did you say, "I moved them in." Did you say that?

A Bill, I don't recall.

Q Did you say, "I feel like they've been in long enough for you to see the volume, and you know what kind of business you are doing," did you say that?

THE WITNESS: Judge, can I get the Attorney General —

MR. SIKES: Just answer that, just sit there and answer the questions as best you can.

A I just don't remember, sir.

Q Did you say, "If you are losing money, I'm sorry"?

A I don't know, Bill.

Q Did you say, "But the only thing I can say, is this, that those blank are in"?

A I don't know, Bill.

Q Did you say, "You've been in there long enough, and in fairness for you to see what the volume is"?

A I don't know, Bill.

Q Did you say, "And to see what is — what is pretty well what's been done and what it hadn't done, and now, if it's making a profit —"

A I don't know, Bill.

Q And did Rex cough?

A I don't know, Bill.

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Q And you continue, "I'll feel like if you want to be fair in it, and we could come to some agreement on it —"

A I don't know, Bill.

MR. SIKES: That's even miscorrectly read, Your Honor. "If we could come up to some agreement on it —"

MR. BAXLEY: I'm sorry, misread the "up".

Q Did you say, "If you want to be fair in it, if we can come up to some agreement on it"?

A I don't know, Bill

Q Something unclear. And did you say before anybody else said anything, "You know you say you got problems, well, I have, too, we all have"?

A I don't know, Bill.

Q Did you say, "You got to keep this in mind, Rex, that er — that aa — you wanted them in, we got them in, you wound up doing all the volume of business," did you say that?

A I don't know, Bill.

Q But you said, "You would come, you would —" and then, something unclear, and Moore said, "I sure would"?

A I don't know, Bill.

Q And then it says, Moore says, "I sure would." Did you say — unclear — and then say, "And stuff, and January, around the 18th or 20th, February, March, April, May, June, they been there a full five months plus." Did you tell him that?

A I don't know, Bill.

Q And, "My automobile last year, you agreed to to tell me how the volume was doing," did you say that?

A I don't know, Bill.

Q Did you say, "Our main problem, I don't know what your other machines are doing, I couldn't care less"?

A I don't know, Bill.

Q Did you say, "But I think this is sound business and we had an agreement on it"?

A I don't know, Bill.

Q Did you say, "I think it's time to see where we stand."

A I don't know, Bill.

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Q Did you say, "Now, then, if — if you got problems

otherwise, I don't think you need to let our agreement get drug into the other thing"?

A I don't know, Bill.

Q A little later on, the conversation, did Rex say, did you say, "If you feel like I've mistreated you, I'm sorry, I don't see how or why I have, I haven't bothered you that much." Did you say that?

A I don't know, Bill.

Q Did he right then, say, "You've known me a long time you know g.d. well if I could do it, I would do"?

A I don't know, Bill.

Q Did you right then say, "I don't doubt it. The question is, if you have been there long enough business-wise, and if

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some understanding can be reached, I think it's time to reach it." This is you talking, did you say that?

A I don't know, Bill.

Q "If no understanding can be reached —" and then trail off, you don't know whether you said that or not?

A I don't know, Bill.

Q Kenneth, later on, did you ask him, "Do you feel like, well. I should be compensated any"?

A I don't know, Bill.

Q Did you ask him how much volume they were doing? And question him about it, Kenneth?

A I don't know, Bill.

Q Did you tell him, "I think what the deal is, why you should talk to me, is what we originally agreed upon"?

A I don't know, Bill.

Q Can you answer, and tell him, "I think if you would, my situation would be this, I think that if you could come to some satisfactory understanding with me"?

A I don't know, Bill.

Q Kenneth, if you said that, what were you talking about?

MR. BEATY: We object to that, he said he didn't know.

THE COURT: He said he didn't know.

MR. BEATY: We object to that.

THE COURT: Well, he's already answered the

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question.

BY MR. BAXLEY:

Q And did he say, "Now, —" and you say, "If you want to try to come to that, then I'm ready"?

A I don't know, Bill.

Q Kenneth, did you tell Charles Price that when you were trying to get him to take the machines out, "I'm just going to tell you, we are not going to get along, you are not going to get what you need, unless these people come through with what they told me they were going to do"?

A I have never threatened Charles Price in any manner, or told him anything of that nature, to my knowledge, sir.

Q I don't mean threaten him. You say you've never told him anything like that?

A No, sir.

MR. BAXLEY: That's all.

REDIRECT EXAMINATION

BY MR. BEATY:

Q Ken, did the A.G. ask you about Mr. Price, is what Mr. Price testified to yesterday at the end of his testimony, did he tell the truth, or did you ever threaten him about the rate increase?

A No, sir, I've never threatened him about the rate increase.

Q Did you all ever discuss the rate increase in any